

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 18, 2008 Session

STATE OF TENNESSEE v. ANTHONY K. SMITH

**Appeal from the Circuit Court for Williamson County
No. CR021638-A Timothy Easter, Judge**

No. M2007-02742-CCA-R3-CD - Filed November 5, 2008

After pleading guilty to aggravated assault, Appellant, Anthony K. Smith, received a sentence of five years. The trial court denied alternative sentencing and ordered Appellant to serve his sentence in incarceration. Appellant appeals, arguing that the trial court should have granted some form of alternative sentencing. We determine that the record supports the trial court's denial of alternative sentencing because of Appellant's long criminal history, in order to avoid depreciating the seriousness of the offense, and because measures less restrictive than confinement have been applied to Appellant unsuccessfully. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Michael T. Fort, Franklin, Tennessee, for the appellant, Anthony K. Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Ron Davis, District Attorney General, and Kim Helper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In February of 2006, Appellant and Darius T. Gentry were indicted for two counts of attempted first degree murder, aggravated assault involving serious bodily injury, two counts of aggravated assault with a deadly weapon, reckless endangerment, and vandalism over \$1,000.

In June of 2007, Appellant pled guilty to Count Three of the indictment, aggravated assault involving serious bodily injury, a Class C felony. The plea agreement stipulated that Appellant would receive a five-year sentence as a Range I, standard offender in exchange for the guilty plea with the manner of service of the sentence to be determined by the trial court at a sentencing hearing. The remainder of the counts were dismissed. At the guilty plea hearing, Appellant also entered a stipulation that a factual basis for the plea existed.

The trial court held a sentencing hearing to determine the manner of service of Appellant's sentence. At the hearing, Kevin E. Adams, a detective with the Franklin Police Department, testified that Marita Dodson was driving her car on October 3, 2005, on Chestnut Lane in Franklin, Tennessee. The car contained three passengers. When Ms. Dodson got out of her car, Appellant and the co-defendant drove by and began shooting. Ms. Dodson was shot in the breast. The shooting occurred around 3:30 in the afternoon across the street from an elementary school that was in session. Detective Adams's investigation revealed that Appellant was the principal shooter and that there were children in the area at the time of the shooting.

Appellant presented proof at the sentencing hearing in order to show his amenability to an alternative sentence. Appellant's grandfather, Bob Smith, testified that Appellant has strong family ties and a stable place to live if he were granted probation. Additionally, one of Appellant's former employers testified that he was willing to rehire Appellant as an employee at Wendy's despite his criminal background. Appellant's fiancé, Quethlyn Holden, testified that he would live with her if he were granted probation and that she would help him comply with the conditions of his release. Ms. Holden stated that she had noticed a change in Appellant's behavior since his incarceration. Specifically, she felt that he had learned from his behavior.

At the conclusion of the sentencing hearing, the trial court determined that Appellant was a favorable candidate for alternative sentencing because he was convicted of a Class C felony. However, the trial court denied alternative sentencing and made the following findings:

The Court finds that based upon the presentence report submitted on [Appellant], that confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct.

In reviewing his presentence report, the Court was satisfied that at least six prior felonies or actually seven, I believe, seven prior felony convictions have been entered - - make that eight, eight prior felonies have been found against [Appellant] in the past which certainly renders him a defendant who has a long history of criminal conduct.

Additionally, the Court is satisfied that based upon the proof that I've heard in this case that confinement is necessary to avoid depreciating the seriousness of this offense. This shooting took place in an area where elementary school-age children were present or had been present or at a time when they should be present. It was in

the area of an elementary school. And, secondly, this is a crime of violence which certainly necessitates a sentence that would avoid depreciating the seriousness of the offense.

Additionally, the Court finds as it relates to [Appellant], measures less restrictive than confinement have frequently or recently been applied unsuccessfully to him. He was on parole at the time he committed this offense and has received probation and parole on several prior convictions.

He does have, apparently, has completed that parole while this case has been pending, but, nonetheless, at the time of the offense, he was on parole and measures less restrictive than confinement have been applied unsuccessfully to him.

The Court finds that a sentence of five years is an appropriate sentence that is not greater than deserved for the offense committed in this case. The defendant does have a strong - - I'm satisfied has a strong family background and Court is impressed with the family stability that he has demonstrated today through testimony of family and - - but those factors do not offset the other considerations that I believe require the five-year sentence to be served in [Appellant's] case.

I'm satisfied that he has little potential for rehabilitation. It's been tried before through both probation and parole. And I'm satisfied that a five-year sentence to serve in his case as a standard offender is more than just because in reality, he's more than just a standard offender. He has prior convictions that really makes him something along the line of a range two or three offender.

Appellant filed a timely notice of appeal, challenging the trial court's decision to deny alternative sentencing.

Analysis

On appeal, Appellant argues that the trial court "unduly weighted [sic] the evidence that was presented at the sentencing hearing." Specifically, Appellant contends that the trial court improperly found that the events "occurred in an area where children were present" when this fact was not adequately supported by the record and amounted to hearsay. Appellant avers that the trial court's reliance on this hearsay amounted to a plain error denial of alternative sentencing in Appellant's case. The State disagrees, asserting instead that the trial court's denial of probation "in order to avoid depreciating the seriousness of the offense and in recognition of [Appellant's] dim prospects for rehabilitation was warranted."

"When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. §

40-35-401(d). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant’s potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant’s statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” *Ashby*, 823 S.W.2d at 169.

In regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal history evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders “and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline.” T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). A defendant is eligible for an alternative sentence if his sentence is less than ten years. T.C.A. § 40-35-303(a).

In determining a defendant’s suitability for a non-incarcerative sentencing alternative, the court should consider whether:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). The court should also consider the defendant’s potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5).

Appellant herein was found guilty of a Class C felony. Thus, Appellant is considered a favorable candidate for alternative sentencing. However, Appellant is not entitled to a Community Corrections sentence because he committed a violent felony. *See* T.C.A. § 40-36-106(a)(1); *State v. Birge*, 792 S.W.2d 723, 724 (Tenn. Crim. App. 1990).

Even though Appellant was statutorily eligible for probation, his criminal history and conduct indicate a lack of potential for rehabilitation. Appellant had a record that included eight prior convictions, including introduction of contraband into a penal facility, aggravated robbery, two convictions for forgery, and four convictions for possession of cocaine with the intent to sell. In fact, Appellant's classification status would have been higher than a Range I standard offender, but the plea agreement allowed him to enter the guilty plea as a Range I offender. Appellant does not deny that he has an extensive criminal record. Further, Appellant does not deny that measures less restrictive than confinement have been applied to him in the past or that he has failed to comply with the terms of those sentences. In fact, Appellant was on parole when he committed the offenses charged in the indictment. Furthermore, the presentence report reflects that Appellant had received probationary sentences in the past with no success. Irrespective of whether the evidence in the record is sufficient to support the trial court's determination that Appellant's actions endangered children in the area of the shooting involved in this case, his lengthy criminal record and demonstrated lack of rehabilitation in the past warrant the denial of an alternative to incarceration.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE